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STATE POLICE POWERS AND FEDERAL PROPERTY GUARANTEES.

The Federal Constitution as originally adopted contained only two clauses that could be said to be guarantees of property rights[1] as against the exercise by the States of their Police Powers. They were contained in the Commerce Clause, providing that Congress shall have power to regulate commerce with foreign Nations and among the several States, and in the Fugitive Slave Clause. The Commerce Clause, in that it signified freedom of commerce from State control was a guarantee of property rights involved therein, and the Fugitive Slave Clause, in that it secured the return of the fugitive slave was a guarantee to the Slave States of slave property. Both operated to restrain the States in the exercise of their Police Powers touching the property in question.

We do not overlook the provisions forbidding the States to pass laws impairing the obligation of contracts, that full faith and credit should be given by each State to the public acts, records and judicial proceedings in every other State, that the citizens of each State should be entitled to all the provisions and immunities of citizens in the several States, nor such provisions as those delegating to the National Government the power to tax, to establish uniform bankruptcy laws, and to coin money and regulate the

[1]It is, of course, Common Law property rights which are referred to. Special property rights, such as patents, copyrights, etc., are excepted from consideration here.

value thereof, and to fix the standard of weights and measures. All these may at times affect property rights and possibly override some manifestations of State Police Powers, but their effect is indirect and incidental and they are in no sense limitations on State sovereignty in respect to property rights and are not to be considered here.

The jealousy by the States of the Federal Power which thus showed itself in the Federal Constitution as originally adopted was none the less active in 1789 when the first ten amendments were added, for, as is well known, these were directed against the National Government in their restrictive effect and were not intended to apply to the States. They in effect provided, touching property, that no person should be deprived by the Federal Government of life, liberty or property without due process of law, and that private property should not be taken by the same for public use without compensation. The States in these respects were still left free of Federal limitations.

The view expressed above is amply sustained by an examination of the early cases wherein it was sought to invoke Federal protection for property rights as against hostile State legislation. The License Cases, Thurlow *v.* Massachusetts, Fletcher *v.* Rhode Island and Pierce *v.* New Hampshire[1] arose out of the statutes enacted by those States prohibiting or restraining the retail trade therein in spirituous liquors, confining such trade to licensed dealers, and providing that the local authorities should have absolute power to withhold the license if in their opinion the public good so required. The penalty provided by the statutes was fine and imprisonment after conviction. As the statutes applied to liquors brought into the States in question from the adjoining States as well as to domestic liquors the question presented was an interstate question, to wit—the right of a State to impair and even to destroy the property status of spirituous liquors coming into it from an adjoining State under the laws of which it enjoyed the full property status. This question appeared most clearly in the case of Pierce *v.* New Hampshire where the local authorities had refused to grant licenses and the case

[1](1847) 5 How. 504.

turned on a barrel of gin manufactured in Massachusetts, purchased by Pierce there and brought by him into New Hampshire where it was sold in the same barrel (that is, the original package) in which it had been purchased. The Court held the statutes valid exercises of the Police Powers of the respective States. It was conceded that the only provision of the Federal Constitution affecting the question at issue was the Commerce Clause—that is, apart from that clause there was no provision in the Constitution, no guarantee nor delegated Federal power which could preserve the status of property localized within a State, whether it was property originally existing in the State or coming into it from other States, from the exercise of the State Police Power. In deciding this case the Court gave to the Commerce Clause only a qualified or potential paramount effect. It held that if Congress were so disposed it could in the exercise of the Commerce power, by legislating itself, to that extent prevent legislation by the States, but as, touching the point of interstate commerce involved, Congress had not legislated, the States were free to do so in the exercise of their Police Powers.[1]

An examination of the Slavery Cases, Prigg *v.* Pennsylvania;[2] Strader *v.* Graham;[3] Dred Scott *v.* Sanford,[4] likewise demonstrates that there was no general Federal guarantee or provision protecting property from the exercise of the State Police Power. Property in slaves was protected by the Federal power and the escaping slave was returned to servitude from the Free State by virtue of the Fugitive Slave Clause and by that exclusively.

In the case of Prigg the slave escaped from Maryland into Pennsylvania and resided there five years. He was seized in Pennsylvania by Prigg, an agent from the owner

[1]The Court in Brown *v.* Maryland, 12 Wheaton 419, in 1827, had held void a statute of Maryland requiring importers in that State of goods from foreign countries to take out a State license upon the ground that Congress had legislated in respect to said foreign commerce by imposing duties under the Federal Revenue Law. Such legislation it was held was to be taken as signifying that Congress had assumed jurisdiction over the matter in question. In the License Cases no such duties and no taxes or regulating imposts of any kind had been imposed by the Federal Government and the field affected by the State statutes in those cases was free for the time being of Congressional legislation and therefore open to the exercise of the State Police Powers.

[2](1842) 16 Peters, 540. [3](1850) 10 How. 82. [4](1856) 19 How. 393.

in Maryland, and carried with force into the latter State, contrary to the statute of Pennsylvania making it a felony therein to take a negro with the intent of causing him to be kept in servitude. Prigg was arrested under the statute and convicted. His conviction was confirmed by the highest court of Pennsylvania, and was then reviewed by the Supreme Court of the United States upon the ground that the statute of Pennsylvania was repugnant to the Fugitive Slave Clause. The Court sustained this claim, holding in effect that Pennsylvania could not by her statute impair or destroy property in a slave coming within her territorial limits from the Slave States.

In these cases, as in the License Cases, the salient feature is the unqualified recognition by the court that the Federal Government had no power to restrain in any degree the exercise by the States of their Police Power touching the status of property, excepting property involved in interstate commerce and property in slaves under the two special clauses referred to.

It will, of course, be borne in mind that the powers delegated in the Commerce Clause and in the Fugitive Slave Clause were of a different nature. The former delegated the power to be exercised in the discretion of Congress. In the latter there was no discretion and no legislation by Congress was necessary to set the power in motion. The Fugitive Slave Clause itself directed the return of the escaping slave and to that extent, by its own terms, guaranteed property in the slave as against the Police Power of the Free State, on whose soil he might be at the time. By virtue of that single clause in the Constitution the slave remained property in every sense of the word regardless of the law of the State into which he had escaped and where he was found. It may be confidently asserted that without these two clauses a State would have been free to confiscate, in effect, the barrel of gin brought within its borders from another State or to have manumitted the Slave from a Slave State the moment that he set foot upon her soil.

The Slavery Cases with their application of the Federal guarantee of the property rights involved, were followed by civil war. On one side of the conflict were the

Slave States, in whose behalf the guarantee had been applied, and on the other side were those Free States against whose Police Powers it had been applied. The latter triumphed, and in the hour of that triumph, notwithstanding that it was the enforcement of a Federal property guarantee as against their profoundest moral convictions that had engendered the conflict, it grafted on the Federal Constitution the Fourteenth Amendment providing that no State should thereafter deprive any person of life, liberty or property, without due process of law. Did this provision stamp every object known to the law as property at the time of its adoption with the status of property forever, and regardless of the obvious consideration that moral and political exigencies might still arise engendering as profound differences in the moral sense of the people on the subject of property, as that which was created by the issues of the slavery epoch? Did the Fourteenth Amendment take from the States their Police Powers or impair them in any degree and to that extent guarantee property rights? If it accomplished this purpose then we have the anomaly of the victorious party in a great conflict availing itself of the hour of its triumph to shackle the moral forces which created it with additional chains similar in kind to those under the oppression of which it had risen, and which in its rising it had stricken to the ground.

But the Supreme Court quickly confined the Amendment in its legal scope largely to the territory involved in that great conflict out of which the Amendment issued—that is, to property in man and the right of emancipated slaves to civil liberty and equality before the law.

In the Slaughter House Cases[1], Mr. Justice Miller, writing the opinion of the Court, declared that

"the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him, was the *one* pervading purpose of the Fourteenth Amendment."

This opinion of Mr. Justice Miller has been much criticised, and there has been some attempt on the part of the Supreme Court to modify the views which he expressed.

[1] (1872) 16 Wall 36.

In Holden *v.* Hardy[1] the Court expressly declared that the amendment had largely expanded the power of the Federal Courts and that it authorized the former to declare invalid all laws and judicial decisions of the States abridging the rights of citizens or denying them the benefit of due process of law. Nevertheless the Court has expressly and repeatedly held that the amendment did not impair the Police Powers of the States, that the exercise of those powers is due process of law and does not abridge property rights since such rights are in their nature subject to those powers. In Barbier *v.* Connolly[2] the Court said:

"but neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its Police Power, to prescribe regulations to promote the health, the peace, morals, education and good order of the people, and to legislate so as to increase the industries of the States, develop its resources, and add to its wealth and prosperity."[3]

In cases involving the question of property in spirituous liquors, decided since the Amendment, the Court has reit-

[1] (1897) 169 U. S. 366. [2] (1884) 113 U. S. 31.

[3] It is not necessary to consider here the precise effect of the Fourteenth Amendment. It is somewhat difficult to reconcile the reiterated declarations of the Court that the Police Powers of the States were not impaired by the Amendment with such statements as those made by the Court in Holden *v.* Hardy. It is submitted that the difficulty is largely a matter of definition and the lax use of terms.

The Fourteenth Amendment has certainly given to the Federal Tribunal a power which was not expressly delegated to it prior to its adoption, and that is the power to review the exercise of their Police Powers by the States, and to determine whether in the opinion of the Court such exercise is valid, or a mere cloak to confiscatory and oppressive legislation. This power may exist in the Federal Tribunal consistently with the doctrine that the Fourteenth Amendment has not impaired the Police Powers of the State, for it is clear that a confiscatory Statute, passed under the pretense of an exercise of the Police Power, is in no sense of the word an exercise of that power, but is a revolutionary act, violating the fundamental principles of the body politic and transcending the correction of judicial power. The Amendment has certainly thrown a safeguard around State legislation in that it must now pass the scrutiny of the Federal Court, but it is equally clear that such scrutiny must be addressed almost entirely to the question of the good faith of the State legislation.

The Supreme Court said in the Slaughter House Cases "that the Police Power is and must be from its very nature incapable of any very exact definition or limitation."

It may be added that its limits change largely with the moral sense of the community and with every economic, social and political exigency.

The present limits of that Power are, for the purposes of this article, best indicated by references below to the decisions of the Supreme Court holding constitutional various State statutes enacted under it.

erated the conclusion that the Fourteenth Amendment afforded no additional guarantee.[1]

It is true that in cases involving interstate commerce in spirituous liquors the Court has somewhat modified the doctrine of the License Cases and has extended the force and effect of the Commerce Clause. Its late conclusion is that the Commerce Clause prevails over the State Police Powers to the extent of giving to a citizen, irrespective of the State Laws, and in the exercise of his Federal Constitutional right, the privilege of making one sale in the original package in his State of the proscribed goods brought from another State. Thereafter the goods in legal theory become become part of the body of property within the State where they are sold and subject to its Police Power. On this point the late decisions of the Court have expressly qualified the decision in Pierce *v.* New Hampshire. The Court has also extended the effect of the Commerce Clause by holding that absence of legislation by Congress in respect to a matter of interstate commerce signifies, not the assent of Congress to State legislation thereon, but the will of Congress that in respect to such matter such commerce should be free. On this point it will be observed the case of Pierce *v.* New Hampshire is overruled.[2]

The principles declared by the Supreme Court in the cases of spirituous liquors above referred to have been reiterated and applied in respect to other kinds of property. The ruin wrought to the Oleomargarine properties by State legislation will be readily[3] recalled, and decisions of the Court in favor of the right of a State in the exercise of the Police Power to prevent the sale of adulterated goods from other States are now making their appearance.

All these later decisions of the Court only illustrate more clearly that the Constitution, even as enlarged by the Fourteenth Amendment, affords no Federal guarantee of property rights as against the exercise of State Police Powers,

[1] Bartmeyer *v.* Iowa (1873) 18 Wall. 129; Boston Beer Co. *v.* Massachusetts (1877) 97 U. S. 25; Mugler *v.* Kansas (1887) 123 U. S. 623.

[2] Bowman *v.* Chicago & N. W. R. R. Co. (1888) 125 U. S. 465; Kidd *v.* Pearson (1888) 128 U. S. 1; Leisy *v.* Hardin (1889) 135 U. S. 100.

[3] Powell *v.* Pennsylvania (1887) 127 U. S. 678; Schollenberger *v.* Pennsylvania (1897) 171 U. S. 1; Collins *v.* New Hampshire (1897) 171 U. S. 30.

except under the Commerce Clause. But the effect of that clause is confined within the narrow limits of commerce interests, and it secures nothing more than one sale by the importer in the original package free from the application of the State law. The Fugitive Slave Clause has been nullified by the Fourteenth Amendment and that in turn has been held to have no effect as a guarantee of property rights against the Police Powers of the States provided those are exercised in good faith. Each State in the exercise of its Police Power may determine the status of property, may impair and in effect destroy it, whether such property exist originally within the State or come therein from other States in which it enjoys the full property status. No interstate rights or obligations can be pleaded by the other States and there is no Federal power or guarantee which they can invoke. Violent as was the revolution in interstate property rights marked by the Fourteenth Amendment, it was confined, with the qualification stated above, to one species of property which it swept out of existence. All other property in the States of the Union remained with attributes and incidents the same as from the beginning wholly subject to the State Police Powers to whose dread exercise property always has yielded as readily as wax in the blaze of the furnace.

It is desirable at this point to refer to cases which reveal, as no definition can, the present limits of the Police Power under our law. We may select the Slaughter House cases;[1] Mugler *v.* Kansas;[2] Munn *v.* Illinois.[3]

In the Slaughter House cases the Court sustained the exercise of the Police Power by the State of Louisiana in a statute which in effect destroyed the value of a large amount of property in lands and buildings and fell with crushing force upon the citizens of the State engaged in slaughtering. The statute provided that that business should be entirely given over to a single corporation, or, if pursued by others, should be conducted on the premises of such privileged corporation upon payment thereto for the privilege. We quote from the language of Mr. Justice Field in his dissenting opinion:

[1] (1872) 16 Wall. 36. [2] (1887) 123 U. S. 623. [3] (1876) 94 U. S. 113.

"The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and then allowed only upon onerous conditions."

In the case of Mugler *v.* Kansas, the State statute prohibited the manufacture and sale of intoxicating liquors for use as a beverage, declared all places for their manufacture, sale or gift, common nuisances, and provided that upon the judgment of a Court to that effect, the sheriff should close them and *destroy all property* including not only liquors, but screens, bars, tables, glasses and other property used therein, irrespective of the fitness and value of such property for other and innocent purposes. The owner was upon conviction to be punished by fine and imprisonment. No jury trial was provided for.

In the Grain Elevator Case, Munn *v.* Illinois, it was held that a State Legislature could fix by law the maximum charges for the storage of grain in warehouses in the State held in *private ownership*, and it was asserted that private property, when it is devoted by the owner to a public use or the prosecution of a business affected with a public interest, is subject to legislative regulation in respect to prices and charges. This decision profoundly affected all property interests in the United States, and may be considered as one of the most momentous ever rendered by the Court. By subsequent decisions,[1] the Court held that such prices and charges must be reasonable, and that the power to review the Statute fixing them and to hold the same unconstitutional and void for unreasonableness was a judicial power—a qualification which mitigates to some extent the sweeping character of the first decision. But as this rule of reasonableness must change with public sentiment, and yield to economic and political exigencies, to the influence of which courts as well as legislatures are subject, its efficacy may well be doubted.

[1] C. M. & St. P. R. R. Co. *v.* Minnesota (1889) 134 U. S. 418; Covington & Lex. Road Co. *v.* Sanford (1896) 164 U. S. 578.

Such being our Constitutional Law of property rights, it is difficult to discover any basis for that rigid conception of property which prevails in American life, for that widespread notion of Federal property guarantees ready to be invoked by the citizens of the States, for that conviction so deeply imbedded even in intelligent minds that the legal conception of property is definite and permanent, that "property" existed prior to the Constitution and is superior to it, and that the principal object of that instrument is to preserve it forever in its original lines regardless of economic, social and moral changes, the exigencies of society and the very life of the State itself.

So distinguished an authority on the practical side of the property question as Mr. Morgan in his testimony in the Northern Securities Case, defined the principle of community of interests as "that principle that a certain number of men who own property, can do what they like with it." It is clear that under our law the most powerful individual cannot do as he likes with his property. The artificial ownership that arises from combination or incorporation as hereafter more fully pointed out, so far from extending the rights of property, limits them and subordinates them further to the public interest. The Common Law maxim, "A man may do as he will with his own," is frequently quoted. The qualification which the Common Law always attached is overlooked or disregarded—"so that he does not injure another." In the first clause of the maxim is the sum and substance of the Common Law of private property; in the second clause is its condensed doctrine of the Police Power. To state either without the other is a manifest perversion.

It was the grave contention of the coal owners that the late controversy between them and their employees was a purely private affair, in which the public had no interest. Through artificial combination they had stifled competition, and possessed themselves practically of the national anthracite coal supply. They had as donations from the Public their right of combination, perpetuity of existence in their corporations, their railway franchises across the public domain. With all this they asserted that their rights and duties were only those of private owners. The claim

was even made that inasmuch as the Public could use bituminous coal, anthracite coal was not a necessary of life, and that therefore the Public had no interest in the situation—a suggestion which savored much of the innocent inquiry of the Queen of France, at a somewhat critical period of the world's history, "If the people cannot get bread, why don't they eat cake?" Not less remarkable were the claims of labor combinations on the opposite side of the controversy in respect to their commodity of labor. The true answer to the claims of both parties is that as the one side by combination had assumed the duty of supplying the Public with coal, and as the other side had assumed the duty of supplying the Public with labor, both had entered upon a service or duty affected, yes, dominated, by a public interest, and the interposition of the Public by way of legislative action, and even by the much criticised action of the Chief Federal Executive, may have had, under the doctrine of the Grain Elevator Case, and the force of the Commerce Clause, a firmer legal and constitutional basis than was apprehended at the time.

Not the least important fact in that Case was that the property affected was vested in individual as distinguished from corporate ownership. It was quite generally conceded that if the grain elevators had been owned by corporations in the enjoyment of public franchises, the decision of the Court would have rested on a firmer basis, but the basis of the decision, as we have said, was not the nature of the ownership, but the fact that the property affected was "devoted to the public use" or "affected with a public interest."

Space does not permit of commenting further on that momentous decision. We may however refer here briefly to its importance to the interstate corporation question. It may be said that a "trust," (and by that is meant nothing more than the corporation of sufficient size to absorb all or a substantial part of a particular class of property, manufacture or trade), in that it assumes to supply the Public with a particular service or commodity[1], becomes thereby "affected with a public interest" and therefore within the doctrine of the Grain Elevator Case, peculiarly

[1] The corporation embracing the trolley lines, gas and electric interests of several counties in New Jersey calls itself "The Public Service Corporation."

subject to legislative control. In view of this fact, the recourse of the most important property and industrial interests of the country to incorporation as a method of ownership and development would seem to be fraught with some peril, and if some late writers on political economy are correct, to verify the maxim, "Whom the Gods would destroy they first make mad."

The enormous industrial expansion and material development of the last twenty years has necessarily engendered interstate property problems of great magnitude. Railway extensions and consolidations[1], irrigation schemes[2], sanitary systems[3], and municipal water supplies[4], have brought before the Supreme Court interstate questions of novel aspect and great importance. To these conditions the vast increase in the corporate form of ownership and enterprise have largely added. The "trust" as defined above, in its largeness of resources, which is the essential result of combination, easily groups in one artificial ownership, created and localized in one State, property and rights existing in and ramifying through many different States. Every such artificial ownership may raise interstate questions, may present a conflict between property rights and Police Powers, for under our Federal system every such artificial ownership rests upon quite a different legal basis from that which underlies individual or natural ownerships.

The Constitution provides by Article IV that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, but it nowhere provides that the corporations of each State shall be so entitled.[5] Therefore, while citizens of each State may in

[1] The Northern Securities Merger.

[2] Kansas *v.* Colorado (1902) 185 U. S. 125.

[3] Missouri *v.* Illinois (1900) 180 U. S. 208.

[4] New York City *v.* Pine (1902) 185 U. S. 93.

[5] Corporations as is well known have been held by the U. S. Supreme Court not to be citizens, and hence not to be entitled to the privileges of citizens within the provisions of Article IV of the Federal Constitution. Santa Clara Co. *v.* Southern Pac. R. R. (1885) 118 U. S. 394. They are, however, held to be persons and therefore entitled to the protection of the Fourteenth Amendment. Covington Turnpike Co. *v.* Sanford (1896) 164 U. S. 578. No contention is of course intended to be made in the text that *if a State permits* the acquisition of property within it by a corporation of another State, it can *subsequently arbitrarily* deprive that corporation of its property. The Fourteenth Amendment would of course, prevent.

common with the citizens of any other State acquire and hold property within that State, a corporation created in one State cannot acquire and hold in corporate ownership property in another State whose laws forbid such corporate ownership.

It is therefore clear that it is quite within the power of a State to discriminate against the corporations of other States, in the pursuit of its policy and in the exercise of its Police Power. As a State tends to industrial co-operation and an intensified social development, so it will extend its encouragement to the corporate form of ownership and enterprise, but as its policy may be directed against such development, as it may tend toward individualism, it will assuredly legislate against the corporation. No more reasonable issue for a difference in State policies can be found. Individuals as members of the body social and politic, in the nature of things submit themselves to the powers and energies of other *individuals*, as conditions which belong to the natural order of things, but there must be a marked change in fundamental rights and in the status of citizenship as established by the Federal Constitution before the individual citizens of any State can be left wholly exposed to the power of *artificial combinations created by other States.*

Theory and experience alike demonstrate the magnitude of such powers. Our corporations have shown their ability to wield with most oppressive results the despotism of a wealth transcending individual limitations, and to largely impair, if not wholly to reverse the common law condition of competition. It is true that an individual may build up a great fortune, and with it exercise large powers, but in inherent physical limitations and in the shortness of human life, are found sure and certain restrictions upon the exercise of his powers in derogation of the natural rights of his fellows. To withhold property from dead hands, to restrain ownership in perpetuity was one of the prime objects of the Common Law. To these ends the people at large were always engaged in a struggle with vested interests, and perhaps one of the most important questions to-day is to what extent shall corporations be permitted to absorb in perpetual ownership the vast natural properties of the State, such as

the coal deposits, the petroleum supply, the iron mines and all those resources which make up the natural wealth of a People.

The testimony and the argument in the Northern Securities case revealed that the paramount purpose of the capitalists promoting the Merger was to vest a large part of the railway interests of the continent, and ultimately of the Oriental trade of the Nation in one corporate ownership with a view to securing the advantage of perpetuity. The journey of the individuals interested, to the State of New Jersey, some two thousand miles away, for incorporation, was picturesquely described by the senior counsel for the Northern Securities Company at the bar of the Supreme Court, as a race with Death.

Taking together the difference in our law, Federal as well as State, between the status of the corporation and the individual as outlined above, the great development of the corporate form of enterprise and ownership, its economic advantages, its perpetuity of existence, it is evident that the situation must necessarily develop many attempts to affect or control through the corporations of one State the property rights and industrial interests localized in other States, and that such efforts must involve sharp conflicts with the Police Powers of those States.

The issue to which I refer, in one aspect at least, has already been presented to the Supreme Court, for it is a real issue in the Northern Securities Case. Underneath the question whether the Northern Securities Merger is a violation of the Federal Anti-Trust Law, which is the question presented in the case of the United States against that company, is the more fundamental and perhaps the controlling question,[1] presented in the case of the State of Minnesota

[1] In making this suggestion the absence of purely technical questions is assumed. There is a question of jurisdiction in the Case. It is also well known that a question may exist as to the construction of the statutes of Minnesota. There is no doubt but that the spirit and intent of these statutes forbid such a merger of competing railroads in the State of Minnesota as the Northern Securities Company is intended to secure. A question exists whether the language of the statutes is sufficient on this point. They provide that a railroad corporation, a manager or purchaser of a railroad corporation, shall not consolidate with or in any way become the owner of or control any other railroad corporation, or stock thereof, which owns a parallel or competing line. Whether the Northern Securities Company is such a railroad corporation or a manager or a purchaser within the

against that company, whether the Northern Securities Company, under the sovereignty of New Jersey which created it, can assert rights in property localized in Minnesota, contrary to the statutes of that State enacted in the exercise of its Police Power. It is the same question which inhered in the License Cases and in the Slavery Cases—the paramount right of a State in the exercise of its Police Power to determine the status of property localized or situate within its territorial limits as against the legislation of another State, touching such property. The Fugitive Slave Clause alone prevented the assertion of this right in regard to the escaped slave. The Commerce Clause alone prevented its assertion in regard to the barrel of gin, and then only as to the first sale in the original package. What shall prevent its assertion by the State of Minnesota in respect to the railways of that State? By what Federal Power or Guarantee, by what inherent Sovereign Power of her own, can New Jersey assume to determine the status of the ownership of the railways of Minnesota, and by the alchemy of modern corporation law convert real estate in Minnesota into personalty through the medium of stock certificates, and consolidate in the ownership of a New Jersey corporation the railways of Minnesota, whose consolidation the fundamental law and express policy of that State forbid?

The plea may be made, as it has been made by the Northern Securities Company in the Minnesota case, that freedom of commerce forbids that the State of Minnesota should have the power to prevent the consolidation of her State railways, in that such consolidation, necessarily affecting interstate commerce, would be interference therewith, and therefore illegal. The object of this plea is obviously to secure the consummation of the purposes of the Northern Securities Company through the nullification of the Railway Law of Minnesota. But the plea contains within itself its own refutation for surely if the law of the State

meaning of the act is a question in the Case. It should also be borne in mind that the Minnesota Case may be disposed of on some ground touching the injunctive relief asked for. The alleged ownership of the stock was acquired by the Northern Securities Company prior to the commencement of the suit, and under its decisions the Court has the power, if it sees fit, to deny the equitable remedy on the familiar ground of laches or delay.

of Minnesota consolidating her railways is void because inimical to the Commerce Clause of the Federal Constitution, the Law of the State of New Jersey creating a corporation which by original purpose or subsequent accident consolidated those railways in a single ownership would be equally inimical to the Commerce Clause. The plea obviously overlooks the fact that the Railway Laws of Minnesota are laws enacted by that State in respect to property within her territorial limits, and rights and interests of her own creation, while the rights asserted by the New Jersey corporation are asserted under a statute of New Jersey in respect to property localized within a sovereignty remote therefrom. But argument in respect to the validity of the plea is superfluous for the Supreme Court has already spoken. In Louisville & Nashville Railway *v.* Kentucky[1], the Court said:

"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. * * * * * *

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to instruments of such commerce, so far as the legislation was within its ordinary Police Powers. Nearly all the railways in the country have been constructed under State authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

"If it be assumed that the States have no right to forbid the consolidation of competing lines because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation *—a proposition which only needs to be stated to demonstrate its unsoundness.*"

A State has the right at the inception of its railway development to create one or more railroads within its terri-

[1] (1896) 161 U. S. 677.

tory as it pleases, and it is equally undisputed that at all future times it may consolidate or multiply such railroads without in any respect invading the Commerce Power. It would be only in the event of some extreme exigency that Congress could forbid such consolidation or multiplication of State railway facilities with even a pretence of constitutionality. Such Federal action is hardly within the range of possibilities for another method exists by which Congress could effectuate its purpose in the event of such emergency, and that is by the construction of a Federal railway.

There can be no doubt but that if the Northern Securities Company had been organized in the State of Minnesota for the purpose, under legislative assent, of owning and so consolidating railways within that State, that Company could proceed to the consummation of its purpose. In his argument before the Supreme Court in the case of the United States, the Attorney General was asked by one of the Justices whether if a company like the Northern Securities Company in its avowed purpose had the legislative sanction of the State whose railways it sought to acquire, such acquisition could be held to violate the Federal Anti-Trust Law. The Attorney General answered that under those circumstances it *could* be held to violate that law *if* the declared purpose of Congress in respect to interstate commerce would thereby be interfered with. The answer obviously resolved itself into a negative for the declared purpose of Congress in respect to interstate commerce could not in a *legal sense* be interfered with by the consolidation under State Law of State railways. And so perhaps the Attorney General intended to imply.

These considerations, if correct, must go far to ameliorate those conditions of hardship which it has been said must surely follow on the decision against the mergers in the Northern Securities Case. For if the Merger is held not to be void as a violation of the Anti-Trust Law, but void only on fundamental considerations of State autonomy, then that large class of consolidations and combinations, to whose creation the State, whose territory embraces the property rights affected has assented, will be safe from attack.

It will be a radical step for the Supreme Court to assent to the proposition that because the mere fact of ownership, whether by an individual or by that association of individuals which is called a corporation, carries with it the power to use property contrary to law, therefore such ownership is invalid.

It will be a still more radical step for that tribunal to sustain the right of one State within the Union, in the development of its property and corporation interests, to invade the fundamental rights of another State over property within its territorial limits, to wreck its policy in respect to such property, and to render of no effect those Police Powers which the Court for a hundred years has exalted above the Constitution itself.

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